DEALING IN SECURITIES UNDER THE COMPANIES AND SECURITIES LEGISLATION: JUDICIAL SABOTAGE AND LEGISLATIVE COUNTER-ATTACK

Introduction

The Ministerial Council and the National Companies and Securities Commission indicate that the new co-operative companies and securities legislation, which became fully operational on 1 July 1982, will not be the subject of significant amendments until 1984 at the earliest. The aim is to allow practitioners and businessmen time to familiarise themselves with the legislation. Unfortunately, the courts may make this stability objective unattainable. It is apparent that the courts are not going to give the NCSC an easy time; nor have they always acted in a manner consistent with the spirit of the co-operative scheme. Some of the judicial interpretation of the scheme legislation can only be characterised as destructive. This note concentrates on two decisions relating to the meaning of the concept of "dealing in securities" in the Securities Industry Code.[1]

The Securities Industry Code Concept of "Dealing in Securities"

Many key provisions of the Securities Industry Code[2] only apply if there has been a dealing in securities. Thus, for example, s 126 makes it an offence for a person to fraudulently "induce or attempt to induce another person to deal in securities" and s 128(1) makes it an offence for certain persons connected with a company to "deal in any securities of" the company if they are in possession of confidential materially price-sensitive information. In fact, the concept of dealing in securities permeates the insider trading provisions of s 128. The concept is also directly relevant to the power of the NCSC, or its state delegates, to require certain persons to disclose information under s 12(3A). Section s 12(3A)(g)(i) allows the Commission in limited circumstances to require a person, whom the Commission believes on reasonable grounds to be capable of giving information concerning "any dealing in securities", to disclose that information to it. Further, s 13 empowers the NCSC to carry out an investigation if it believes that a person, *inter alia,* has committed an offence against the Code or "any other law with respect to dealing in securities". The courts, under s 14, have the power to make certain orders, on the application of the NCSC, if it appears that a person has committed an offence against the Code or "any other law in force (in the particular jurisdiction) relating to trading or dealing in securities". An inspector may only be appointed to carry out a formal investigation, under Division 2 of Part II of the Code, "into any matters relating to dealing in securities". It is evident that the concept of "dealing in securities" is pivotal to the application of all of these important provisions.

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1 These are not the only recent decisions deserving of much critical comment. See, for example, the remarkable interpretation by Jacobs J of s 20 and s 29 of the Companies (Acquisition of Shares) Codes in *Scott* v *H S Lawrence Pty Ltd* [1982] ACLC 238.

2 Each state has its own Securities Industry Code. The Codes are substantially indentical and they contain the provisions of the ACT Securities Industry Act 1980 (as amended from time to time). The provisions of the ACT legislation apply as the laws of the respective states pursuant to each state's Securities Industry (Application of Laws) Act.

The word "dealing" is defined by s 4(1) of the Code to mean,

> "in relation to securities . . . (whether as principle or agent) acquiring, disposing of, subscribing for or underwriting the securities, or making or offering to make, or inducing or attempting to induce a person to make or to offer to make, an agreement –
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> (a) for or with respect to acquiring, disposing of, subscribing for or underwriting the securities; or
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> (b) the purpose or purported purpose of which is to secure a profit or gain to a person who acquires, disposes of, subscribes for or underwrites the securities or to any of the parties to the agreement in relation to the securities."

The word "deal", as used in provisions like s 126 and s 128, must presumably take its meaning from "dealing". Consequently at first sight it would seem that any person who acquires any securities or disposes of any securities would do so by dealing in the securities. Three State Supreme Court judges have, however, held that the definition of "dealing" does not in fact mean what it appears to say.

NCSC v Industrial Equity Ltd

One of the questions before Needham J in *NCSC* v *Industrial Equity Ltd,*[3] was whether the Companies (Acquisition of Shares) (New South Wales) Code[4] (hereafter referred to as the Takeovers Code) was a "law in force in New South Wales relating to trading or dealing in securities". If it was such a law the court would have the power under s 14(1) of the Securities Industry Code to make certain orders where it appeared that a provision of the Takeovers Code had been breached. The particular infringement that the NCSC complained of was a breach of s 52 of the Takeovers Code which concerns "bluffing bids". There is no provision in the Takeovers Code itself which allows the NCSC to obtain orders in connection with a breach of s 52. Thus it was necessary for the NCSC to rely upon its apparently general power under s 14 of the Securities Industry Code to apply for an appropriate court order to deal with the alleged offence.

Mr Justice Needham decided the question against the NCSC on the ground that the defendant had not breached s 52 of the Takeovers Code and, therefore, s 14 of the Securities Industry Code did not come into play. His Honour, however, then said that even if the defendant had breached s 52 of the Takeovers Code no orders could be made under s 14(1) of the Securities Industry Code because the Takeovers Code was not a law relating to "trading or dealing in securities". After quoting the s 4(1) definition of "dealing" Needham J said:

> "The plaintiff submitted that 'acquiring' a share in a company was, in accordance with the definition, 'dealing' in that share. Such a conclusion is, on its face, unreasonable, and I think the

3 [1982] ASLR 86,197; [1982] ACLC 35.

4 The NSW Code is substantially the same as the Companies (Acquisition of Shares) Codes of the other states. Each of the Codes contains the provisions of the ACT Companies (Acquisition of Shares) Act 1980 (as amended from time to time) which apply as laws of the respective states pursuant to each state's Companies (Acquisition of Shares) (Application of Laws) Act.

> definition would need to be more precise to require it to be drawn. The definition has about it a business flavour. That flavour is emphasised by sec. 14(1)(c), where the Court, 'in the case of persistent or continuing breaches of the Code or any other law in force in New South Wales relating to trading or dealing in securities' may restrain a person 'from carrying on a business of dealing in securities'. Such an order would be inapt where a person had breached a provision of the Acquisition of Shares Codes by, for example, purchasing a number of shares in excess of that permitted.
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> The subject matter of the Acquisition of Shares Code is plainly different from that of the Securities Industry Code, and I think that the phrase 'trading or dealing in securities' relates to the carrying on of that activity as a business or profitmaking venture. The Acquisition of Shares Code is not a law relating to such an activity." [5]

Needham J also thought it "impossible to accept" that s 14(1) of the Securities Industry Code would refer to the Takeovers Code "in such a roundabout manner" despite the draftman's "penchant for obscuring relatively simple concepts".

It is difficult to agree with Needham J that the s 4(1) definition of "dealing" has about it a business flavour. The word "business" does not appear. On the face of it the definition covers any and all acquisitions or dispositions of securities. It is also significant that s 4 has a definition of "dealer" which refers to "a person who carries on a business of dealing in securities". That definition would be somewhat superfluous if "dealing" was meant to have the meaning attributed to it by Needham J. Similarly, if "dealing" was intended to have a business gloss it is surprising that is not spelt out. The definition could, for example, have referred to any acquisition or disposition of a security by a "dealer". The use made by Needham J of s 14(1)(c) of the Securities Industry Code is also highly questionable. The fact that one particular type of order under s 14 by its terms, refers to a person "carrying on a business of dealing in securities" is no reason for reading words such as "carrying on a business" into the Code wherever the word "dealing" appears. If anything, an application of ordinary principles of statutory interpretation would suggest that the Code expressly distinguishes between persons who carry on the business of dealing in securities and those who do not.

Von Doussa v Owens

In *Von Doussa* v *Owens* [6] a majority of the South Australian Supreme Court agreed with Needham J's obiter interpretation of "dealing". One of the questions before the court was whether the appointment of an inspector under the South Australian Securities Industry Act, 1979,[7] was

5 [1982] ASLR 86,197, 86,212-3; [1982] ACLC 35, 51.

6 [1982] ASLR 86,219.

7 The Securities Industry Act has now been superseded by the Securities Industry (South Australia) Code. This Code, like its counterpart in all other states, contains the provisions of the Securities Industry Act 1980 (Cth) (as amended from time to time) which apply as the laws of the state pursuant to the Securities Industry (Application of Laws) Act. The inspector was appointed on 26 May 1981 under the 1979 Act and he continued his investigation under the Code which came into force on 1 July 1981.

invalid in that he had not been appointed to investigate "matters relating to dealing in securities" as required by s 17(1) of the Act.[8] The Court unanimously held that the inspector had been validly appointed. However, Mitchell J, with whom Walters J agreed, after quoting the passage from Needham J's judgment set out above, said:

> "I respectfully agree with those reasons. The definition of 'dealing' in the Companies Acquisition of Shares Code is in pari materia with that in sec. 4 of the Securities Industry Act except that, in the first mentioned Code, a reference is made to 'sub-underwriting' as well as to underwriting securities. It is notable however that throughout that Code, where appropriate, the word 'acquisition' of shares is used and not the word 'dealing' in shares. Notwithstanding the inclusion in the definition of 'dealing' in securities of acquiring, disposing of, and subscribing for securities the mere acquisition, disposition or subscription cannot, in my view, properly be described as 'dealing' in securities." [9]

With respect it is difficult to see how the fact that throughout the Takeovers Code the word "acquisition", and not the word "dealing" is used, has any bearing on the definition of "dealing" in either the Securities Industry Code or Takeovers Code. The Takeovers Code, after all, is specifically aimed at the regulation of *acquisitions* of shares. It would indeed be surprising for that Code to refer to "dealing" rather than "acquisitions" given that "dealing" embraces dispositions as well as acquisitions.

Cox J expressed a very different view of the definition of "dealing":

> "The language of the . . . definition is, in my view, apt to describe any buying or selling of securities, by any person in any circumstances and upon any scale, including, say, the buying of a small parcel of shares on an isolated occasion by a private individual for his own investment purposes. It has been said that the definition 'has about it a business flavour' and accordingly should be given a restricted operation . . . The activities referred to in the definition are specified disjunctively and . . . they do not themselves necessarily connote anything in the nature of 'a business or a profit-making venture' . . . No doubt ordinary private investors do not commonly underwrite securities or do some of the other things described by the draftsman, but they certainly acquire securities and dispose of them and that, as it seems to me, is enough to bring them within the definition. It is true that 'dealing' . . . sometimes carries with it in ordinary usage a notion of trading, frequently as a broker or other kind of middleman. However, in this case the legislature has chosen to give its own meaning to the word . . . and to make that meaning exhaustive." [10]

Cox J also dealt with the significance of s 14(1)(c) of the Securities Industry Code by pointing out that the section contained a specialized order appropriate, for example, for an offending stockbroker. He added:

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8 The equivalent provision of the Securities Industry Code is s 16(1).
9 [1982] ASLR 86,219, 86,232.
10 Ibid 86,221.

> "The specialized nature of the order would be significant, in interpreting the expressions 'trading' and 'dealing', if it were the only order that could be made upon proof of a breach . . . However, there are several powers available to the Court under that section, including the power to restrain a person from buying or selling particular securities or to declare a securities contract to be void or voidable, that might appropriately be made in the case of any person who trades or deals in securities, whether in the course of a business or not. It is simply a matter . . . of applying the various powers . . . in a distributive way according to the particular circumstances of the offence and the offender. It does not . . . cast any light upon the meaning of the word 'dealing'." [11]

Finally, Cox J considered that it was clear, when the Securities Industry Code is read as a whole, that the word 'dealing' should not be narrowly construed:

> "... there are several sections . . . in which 'dealing', or some other form of the verb, is used and the scope of which would appear to be unreasonably restricted if the defining words in the 'dealing' definition are not given their ordinary meaning. The important prohibition in [sec. 128] of dealings in securities by insiders is designed to enforce a standard of commercial morality in particular circumstances. No good reason is apparent for thinking that the legislature wanted to ban insider trading by stockbrokers and other such dealers, or even by those who trade in shares regularly in a big way, but not by, say, a company employee with valuable inside information who has never thought of buying shares before but now sees the chance to make a quick fortune . . . There are other provisions . . . which do not use the term 'dealing' but which prescribe an activity, such as market rigging or disseminating false information, that might accompany the acquisition or disposal of securities on a single occasion by an individual or company and which, in view of the scale of the particular transaction and the public interest involved, might well appear to the Minister to be a fit subject for an investigation under [sec. 16]." [12]

It is submitted that Cox J's reasons are to be preferred to those given by Needham J in *NCSC* v *Industrial Equity Ltd* and by Mitchell J in *Von Doussa* v *Owens*. Unfortunately, the opinion of Cox J is not, at present, the law.

Section 4(1A) of the Securities Industry Code

The Ministerial Council, which has primary responsibility for the co-operative scheme legislation, has responded to the judgment of Needham J.

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11 Ibid.

12 Ibid 86,222. The difficulty of applying a narrow definition of "dealing" to the insider trading provision of the Securities Industry Code also exists with the comparable provision of the National Companies and Securities Commission Act 1979 (Cth). Section 48 of that Act prohibits NCSC members, employees and agents from dealing in securities if they are in possession of confidential price sensitive information relating to the securities as a consequence of their relationship with the NCSC. Section 3(1) defines what is meant by the word "deal" in relation to securities. The definition is substantially identical to the definition of "dealing" in both the Securities Industry and Takeovers Codes.

Its response, however, has at best been only partially effective and, at worst, has further complicated the legal position.

A new provision, s 4(1A), was inserted in the Securities Industry Code by s 208 of the Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth).[13] It reads:

> "Where a person is, for the purposes of the Companies (Acquisition of Shares) . . . Code taken to acquire shares in a company, the person shall, for the purposes of the definition of "dealing" in sub-section (1), be taken to acquire those shares."

What is the meaning and effect of s 4(1A)? Does it statutorily overrule the views expressed by Needham J? Does any acquisition of shares constitute a "dealing" in shares for the purposes of the Securities Industry Code irrespective of whether the acquisition is part of the carrying on of a business of dealing in securities? If it does constitute a "dealing" in securities what is the position in relation to "dispositions" of securities? Is the Takeovers Code now "a law with respect to trading or dealing in securities" for the purposes of the Securities Industry Code?

Pursuant to s 7(1) of the Takeovers Code a person is taken to acquire shares in a company if –

(a) he acquires a relevant interest in the shares concerned as a direct or indirect result of a transaction entered into by him or on his behalf in relation to those shares, in relation to any other securities of that company or in relation to securities of any other corporation; or

(b) he acquires any legal or equitable interest in securities of that company or in securities of any other corporation and, as a direct result of the acquisitions, another person acquires a relevant interest in the shares concerned.

Section 9 of the Takeovers Code contains a sweeping definition of "relevant interest". A person, for example, has a relevant interest in a share if that person (alone or together with an "associate")[14] directly or indirectly has power to (i) exercise or control the exercise of any right to vote attached to the share; or (ii) dispose of or exercise control over the disposal of a share.

The implications of the wide "acquisition" concept for certain provisions of the Securities Industry Code are enormous. Take, for example, the insider trading provision s 128. On the face of s 128(1) a person may only be prohibited from dealing in the securities of a company with which he is or has been connected during the preceding six months. The prohibition, of course, only exists if the person is in possession of information that is not generally available and which is materially price sensitive. Thus s 128(1) would seem to potentially prohibit an insider of a company from buying or selling that company's securities. But given the expansive "acquisition" concept, incorporated in

13 Section 12(7) of the Securities Industry Code has also been amended to make it clear that the NCSC's power to require a person to disclose information relating to an acquisition of securities includes any acquisition which constitutes an acquisition of shares for the purposes of the Takeovers Code. See s 12(7)(b) of the Securities Industry Code, inserted by s 209 of the Statute Law (Miscellaneous Amendments) Act (No 1) 1982 (Cth).

14 "Associate" is defined by ss 7(4)-(7) of the Takeovers Code.

the definition of 'dealing' by s 4(1A) of the Securities Industry Code, an insider may breach s 128(1) by acquiring "a relevant interest" in shares of that company. A "relevant interest" in shares of a company may be acquired as a consequence of acquiring shares in that company or, in some circumstances, acquiring shares in another company. The combined effect of the "relevant interest" definition under the Takeovers Code and the "connected with a body corporate" concept under s 128(8) of the Securities Industry Code means that the likelihood of inadvertent breaches of s 128 (and other sections relating to dealings in shares) has increased dramatically.[15]

It must also be noted that s 4(1A) of the Securities Industry Code only extends the "dealing" definition in relation to *acquisitions of shares.* Acquisitions of other securities do not attract the broad Takeovers Code "acquisition" and "relevant interest" definitions. Further, as s 4(1A) is confined to "acquisitions" it can have no direct effect on what is meant by the words "disposing of . . . securities" in the definition of "dealing". The Takeovers Code "relevant interest" definition does not apply to dispositions of shares or any other securities. This is surely anomalous. As a result there is a much greater chance of a person breaching a provision like s 128 of the Securities Industry Code when shares are acquired than when any securities are disposed of.

The failure of s 4(1A) to treat dispositions in the same way as acquisitions has created another problem. Is it the case that the acquisition of a share by any person under any circumstances involves a "dealing" in the shares whereas the disposition of a share will not involve a dealing unless the relevant person is in the business of dealing in securities? This would appear to be so unless s 4(1A) is interpreted as impliedly overruling the views of Needham J in *NCSC* v *Industrial Equity Ltd*, not only as regards acquisitions, but also as regards dispositions. It is difficult to believe that any court would be prepared to hold that only those in the business of dealing in securities can breach, for example, s 128 of the Securities Industry Code by disposing of securities whereas anybody can breach the section by acquiring securities. Such a result would be absurd. Consequently, it may be that s 4(1A) has indirectly consigned the restrictive interpretation of Needham J and Mitchell J of "dealing" to the annals of judicial curiosities.

Section 4(1A) would also seem to recognise that the Takeovers Code "is a law relating to the dealing in securities" for the purposes of the Securities Industry Code. The Takeovers Code regulates acquisitions of shares, whether in the ordinary course of a business or not, and since s 4(1A) indicates that any acquisition under the Takeovers Code involves a "dealing" in shares, that Code must be viewed as a law relating to dealing in shares. Shares are within the definition of "securities".[15] The specific reference to the Takeovers Code in s 4(1A) would also seem to meet Needham J's difficulty in believing that the draftsman intended to

15 It is curious that the Securities Industry Code itself has a definition of "relevant interest" (see s 5) which is similar to that in the Takeovers Code. Yet it is not this definition but rather that in the Takeovers Code which has now, seemingly, been incorporated into "acquisitions" which constitute "dealings" for the purposes of the Securities Industry Code. Prior to the enactment of s 4(1A) the "relevant interest" concept was completely inapplicable to most of the sections of the Securities Industry Code discussed in this note including the insider trading provision.

16 Securities Industry Code, s 4(1).

catch that Code when using the general words "any other law relating to dealing in securities".

Nevertheless, as indicated above, s 4(1A) has created at least as many problems as it has solved. In so far as the Takeovers Code "acquisition" concept has been incorporated into the Securities Industry Code definition of "dealing", s 4(1A) has significantly enlarged the coverage of many key provisions. This extension in coverage may produce unforeseen and unjust results particularly under the insider trading section. Some response to the gratuitous comments of Needham J was needed; s 4(1A), however, bears all the traits of a hastily devised legislative reaction.

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PERSONAL INJURIES

The survey of South Australian cases involving claims for damages for personal injuries will be resumed in the next issue (Vol 8 No 3).

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